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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

BE

[REDACTED]

FILE:

[REDACTED]

Office: TEXAS SERVICE CENTER

Date: FEB 03 2011

IN RE:

Petitioner:

Beneficiary:

[REDACTED]

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an individual. She seeks to employ the beneficiary permanently in the United States as a houseworker. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's June 13, 2009 denial, the primary issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), grants preference classification to other qualified immigrants who are capable of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on September 4, 2003. The proffered wage as stated on the Form ETA 750 is \$11.18 per hour (\$23,254.40 per year).¹ The Form ETA 750 states that the position requires eight years of grade school, four years of high school and three months of experience in the job offered.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

The evidence in the record of proceeding shows that the petitioner is an individual. On the Form ETA 750B, the beneficiary claimed to have worked for the petitioner as a houseworker from July 1997 to the date she signed the Form ETA 750 on August 28, 2003; and to have worked as a home help aid for [REDACTED] in White Plains, New York, from June 1988 to August 1992.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner submitted paychecks showing that she paid the beneficiary \$3,070.00 in 2003. She also submitted IRS Form 941, Employer's Quarterly Federal Tax Return, evidencing that she paid the beneficiary \$7,607.00 in the second quarter of 2007. Therefore, the petitioner has not established that she employed and paid the beneficiary the full proffered wage from the priority date in 2003 onwards, but she has established that she paid the beneficiary partial wages in 2003 and 2007. Since the proffered wage is \$23,254.40 per year, the petitioner must establish that it can pay the difference between the wages actually paid to the beneficiary and the proffered wage, which is \$20,184.40 in 2003 and \$15,647.40 in 2007,

¹ The director erroneously stated that the proffered wage is \$28,766.40 per year. However, this error does not alter the ultimate outcome of the appeal.

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1).

respectively. The petitioner must establish that it can pay the full proffered wage in 2004, 2005 and 2006.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The petitioner is an individual. Therefore, the individual's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Individuals report income and expenses on their IRS Form 1040, U.S. Individual Income Tax Return, each year. Individuals must show that they can pay the proffered wage out of their adjusted gross income or other available funds. In addition, individuals must show that they can sustain themselves and their dependents. *See Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In the instant case, the petitioner supports herself and her husband. With the petition, the petitioner submitted her IRS Form 1040 for 2005, evidencing an adjusted gross income of \$75,374.00 that year.³ The petitioner indicated that her yearly household expenses are \$57,500.00. The petitioner could not support herself on a deficit, which is what remains after reducing her adjusted gross income in 2005 by her yearly expenses and the proffered wage.

The director issued a Request for Evidence (RFE) to the petitioner on September 11, 2008. The director requested, in part, "supporting evidence such as copies of bank account records, personal tax returns and evidence of other financial resources available to the owner from September 4, 2003 the priority date." The petitioner did not submit her tax returns in response to the RFE. The director subsequently issued a Notice of Intent to Deny (NOID) to the petitioner on October 27, 2008, requesting the petitioner to "submit a copy of the petitioner's annual tax return, including copies of all schedules for each of the years of 2003 to present." The petitioner did not submit her tax returns in response to the NOID. On June 13, 2009, the director denied the petition, noting that the record does not establish that the petitioner had the ability to pay the proffered wage at the time of filing and that the petitioner failed to submit evidence of ability to pay for 2003, 2004, 2006 and 2007. On appeal, counsel submits the petitioner's IRS Forms 1040 for 2003, 2004, 2005, 2006 and 2007.

³ Linc 37 of page 1 of IRS Form 1040.

The purpose of the RFE and the NOID is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted her 2003, 2004, 2006 and 2007 federal income tax returns to be considered, she should have submitted the documents in response to the director's RFE or NOID. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on appeal.

On appeal, counsel asserts that the director did not consider all of the evidence submitted by the petitioner, including evidence provided by the petitioner's son, to establish her continuing ability to pay the proffered wage.

In response to the director's RFE, the petitioner submitted a bank statement from PNC Bank for the period April 15, 2003 to May 14, 2003. It shows an ending balance of \$1,007.09. The priority date in the instant case is September 4, 2003. The bank statement precedes the priority date and, therefore, does not establish the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The director also noted in his decision that the bank statement shows an amount in an account on a given date, and cannot show the petitioner's sustainable ability to pay the proffered wage.

In response to the director's RFE, the petitioner also submitted a Notice of Property Tax Assessment for 2008 issued by the Township of Princeton, New Jersey, evidencing that the assessment for the petitioner's personal residence was \$298,300 in 2007 and 2008. Further, in response to the director's NOID, the petitioner submitted a letter dated November 25, 2008 from [REDACTED] CPA. It states that the petitioner owns her home at [REDACTED] that the home has an approximate fair market value of \$500,000,⁴ and that to the best of his knowledge, the home is free from any mortgage. Regarding the petitioner's property value, a home is not a readily liquefiable asset. Further, it is unlikely that the petitioner would sell such a significant personal asset to pay the beneficiary's wage, nor has the petitioner expressed a willingness and ability to sell her home to pay the proffered wage. USCIS may reject a fact stated in the petition that it does not believe that fact to be true. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

In response to the director's NOID, the petitioner also submitted a brokerage statement issued by [REDACTED] for the period November 1-30, 2008, showing ending balances of \$215,689.81 and \$799,385.08 in two separate accounts. The owners of the accounts are listed as [REDACTED]

⁴ The petitioner did not submit an appraisal supporting this approximate value.

and [REDACTED] as tenants in common.⁵ Pursuant to an affidavit of [REDACTED] dated December 10, 2008, [REDACTED] is the son of the petitioner. He stated that he would “guarantee my mother’s wage payments to her household worker, [REDACTED]. However, the affidavit does not appear to be legally enforceable as a guaranty. The affidavit lacks the period of the purported guaranty and the amount of salary to be guaranteed. Further, the affidavit is dated December 10, 2008, more than five years after the priority date. Even if enforceable as a guaranty of the future wages of the beneficiary, the affidavit of [REDACTED] could not help to establish the ability of the petitioner to pay the proffered wage prior to December 10, 2008. With the I-140 petition, evidence is required of a sponsoring employer’s ability to pay the proffered wage as of the priority date, not a guaranty to support the beneficiary in the future. 8 C.F.R. § 204.5(g)(2). A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Thus, the petitioner has not established her ability to pay the full proffered wage in 2004, 2005 and 2006, or her ability to pay the difference between the wages actually paid to the beneficiary and the proffered wage in 2003 and 2007.

Beyond the decision of the director, the petitioner had not established that the beneficiary is qualified to perform the duties of the proffered position with eight years of grade school, four years of high school and three months of qualifying employment experience.⁶ The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing’s Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

To determine whether a beneficiary is eligible for an employment based immigrant visa, USCIS must examine whether the alien’s credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary’s qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the

⁵ A tenants in common account is one in which there are two or more account owners, with each individual owning a specified percentage of the entire account. The brokerage statement does not identify the percentages owned by either individual.

⁶ An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff’d*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

position of houseworker. In the instant case, item 14 describes the requirements of the proffered position as follows:

- | | |
|-------------------------|-------|
| 14. Education | |
| Grade School | 8 |
| High School | 4 |
| College | blank |
| College Degree Required | blank |
| Major Field of Study | blank |

The applicant must also have three months of experience in the job offered, the duties of which are delineated at Item 13 of the Form ETA 750A and since this is a public record, will not be recited in this decision. Item 15 of Form ETA 750A does not reflect any special requirements.

The beneficiary set forth her credentials on Form ETA-750B and signed her name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 11, eliciting information of the names and addresses of schools, colleges and universities attended (including trade or vocational training facilities), she represented that she received a diploma from [REDACTED] High School in Bronx, New York after attending that school from September 1985 to June 1988. On Part 15, eliciting information of the beneficiary's work experience, she represented that she has worked full-time for the petitioner as a houseworker from July 1997 to the date she signed the Form ETA 750 on August 28, 2003; and that she worked full-time as a home help aid for [REDACTED] in White Plains, New York, from June 1988 to August 1992. She does not provide any additional information concerning her education and employment background on that form.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation*—

- (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii) further specifies for the classification of a unskilled worker that:

- (D) Other workers. If the petition is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification.

The petitioner submitted no evidence to establish that the beneficiary has the required eight years of grade school and four years of high school education, such as transcripts, diplomas or school registration documentation. Going on record without supporting documentary evidence is not

sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Further, the work experience letters provided by the petitioner do not establish that the beneficiary has the required three months of experience in the job offered. In response to the director's RFE, the petitioner submitted three work experience letters. The first letter, dated March 20, 1997 and written by [REDACTED], states that the beneficiary worked for him from 1988 until 1992, and that her duties consisted of caring for his aged father, cooking his meals and tending to his health needs. The letter further states that after the death of his father in 1992, the beneficiary continued to work for [REDACTED] as a housekeeper until February 1996 and resumed her housekeeping duties in November 1996. The dates listed for the beneficiary's employment with [REDACTED] conflict with the dates the beneficiary listed for her employment with [REDACTED] on Form ETA 750B. The letter from [REDACTED] states that the beneficiary was employed by him in Tuckahoe, New York from 1988 until February 1996 (and subsequent to November 1996), while the beneficiary indicated on Form ETA 750B that she worked full-time as a home help aid for [REDACTED] in White Plains, New York, from June 1988 to August 1992. The beneficiary did not list her employment with [REDACTED] on Form ETA 750B.⁷ It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). The petitioner has not resolved the inconsistencies with independent, objective evidence of the beneficiary's employment with [REDACTED]. Thus, [REDACTED] letter does not verify the beneficiary's three months of full-time employment as a houseworker. We note that the petitioner did not submit a work experience letter from [REDACTED] verifying the beneficiary's employment.

The second letter is dated March 25, 1997 and was written by [REDACTED] of Bronx, New York. The letter states that the beneficiary lives with [REDACTED] helps her with the care of her son and helps around the house. The beneficiary did not list her employment with [REDACTED] on Form ETA 750B. See *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976). This letter does not verify the beneficiary's three months of full-time employment as a houseworker.

The third letter is undated and was written by [REDACTED] of Trenton, New Jersey. It states that the beneficiary works for [REDACTED] as a babysitter for her twins while she is at work. The beneficiary did not list her employment with [REDACTED] on Form ETA 750B. *Id.* This letter does not verify the beneficiary's three months of full-time employment as a houseworker.

Thus, the petitioner had not established that the beneficiary is qualified to perform the duties of the

⁷ See *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), where the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B lessens the credibility of the evidence and facts asserted.

proffered position with the required education and qualifying employment experience.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.